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THE ANTITRUST CONVERSATION

STEPHEN CALKINS*

"It's an excellent brief, by the way. I have never met the lawyers who wrote it, but it's an excellent brief." So observed Judge Thomas Penfield Jackson, during the hearing on *Microsoft* remedies, about an amicus brief filed by two trade associations that had proposed a more aggressive divestiture plan than the Justice Department.¹ Judge Jackson kicked off the afternoon session with a series of detailed questions about that brief.² No one can say that antitrust amicus efforts are ignored.

My favorite experience with antitrust amicus briefs is more humble. Shortly after I began service as FTC General Counsel, Judge Richard Posner, writing for the Seventh Circuit and functioning with his customary lightning speed, issued a decision in *Blue Cross & Blue Shield United v. Marshfield Clinic*.³ In it, the court wrote that the defendant HMO was not a monopolist "because HMOs are not a market."⁴ The court also praised "most favored nations" clauses, which it described as "standard devices by which buyers try to bargain for low prices," which is "the sort of conduct that the antitrust laws seek to encourage."⁵ A cautious reading of the opinion would have kept these statements in context, but we worried that observers and litigants might read them aggressively. They were strong statements by a leading antitrust judge.

* Professor of Law, Wayne State University Law School. Professor Calkins was General Counsel to the Federal Trade Commission from 1995 to 1997. This essay has benefited from e-mail and oral discussions with many friends and colleagues and from a student paper by Thomas W. Cronkright II. The author is grateful for the assistance but of course accepts full responsibility for errors.

¹ Transcript of Proceedings, May 24, 2000, A.M. Session at 28, *United States v. Microsoft Corp.*, (D.D.C. No. 98-1232), available at <http://www.microsoft.com/presspass/trial/transcripts/may00/05-24-am.asp>; see Joel Brinkley, *Judge Suggests U.S. Remedy for Microsoft Is Inadequate*, N.Y. TIMES, May 25, 2000, at A1. The brief (available at <http://eon.law.harvard.edu/msdoj/amicus5-19-00.htm>) was filed by the Computer and Communications Industry Association and the Software and Information Industry Association.

² Transcript of Proceedings, May 24, 2000, P.M. Session at 4-5, *United States v. Microsoft Corp.* (D.D.C. No. 98-1232), available at <http://www.microsoft.com/presspass/trial/transcripts/may00/05-24-pm.asp>.

³ 65 F.3d 1406 (7th Cir. 1995).

⁴ *Cf.* 65 F.3d at 1412.

⁵ *Id.* at 1415.

The Antitrust Division and the FTC responded with an unusual amicus brief. We took no position on the merits of the case but expressed concern "that the Court's explanations of its conclusions on two issues may mislead readers unfamiliar with the record and arguments in this case as to the law applicable to market definition and analysis of 'most-favored-nation' (MFN) agreements."⁶ The brief urged the court to qualify its opinion, for instance, by making clear "that its [MFN] ruling related to the particular clause in the particular circumstances at issue in this case and that other cases involving MFN clauses must be evaluated upon their own facts."⁷

Not long after the brief had been submitted, a thin envelope arrived from the Seventh Circuit. Had Judge Posner, who is famous for not suffering fools gladly, promptly penned an order declaring that the antitrust agencies ought to disband if they had nothing better to do than to help edit his opinions? Happily, no: the order made changes responsive to our concerns (and otherwise denied the petition for rehearing).⁸ It had been a productive antitrust conversation.

* * * * *

Marshfield Clinic served to solidify the affection in which I have long held antitrust amicus briefs. Previous writings have noted the role that amici have played in particular cases.⁹ The current essay reflects more systematically on antitrust and trade regulation amicus efforts.

Amicus briefs certainly are popular. Whereas at the beginning of the century amicus briefs were filed in only about 10 percent of Supreme Court cases, today they are filed in 85 percent.¹⁰ The Supreme Court

⁶ Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Petition for Rehearing at 3-4, *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995).

⁷ *Id.* at 8-9.

⁸ *Blue Cross & Blue Shield v. Marshfield Clinic*, 1995 U.S. App. LEXIS 29056 (7th Cir. Oct. 13, 1995).

⁹ Stephen Calkins, California Dental Association: *Not A Quick Look But Not the Full Monty*, 67 ANTITRUST L.J. 495 (2000); Stephen Calkins, *Copperweld in the Courts: The Road to Caribe*, 63 ANTITRUST L.J. 345 (1995); Stephen Calkins, *The October 1992 Supreme Court Term and Antitrust: More Objectivity Than Ever*, 62 ANTITRUST L.J. 327 (1994); Stephen Calkins, *Supreme Court Antitrust 1991-92: The Revenge of the Amici*, 61 ANTITRUST L.J. 269 (1993); Stephen Calkins, *The 1990-91 Supreme Court Term and Antitrust: Toward Greater Certainty*, 60 ANTITRUST L.J. 603 (1991); Stephen Calkins, *Antitrust Law Developments 1989-1990: The October 1989 Supreme Court Term and Antitrust: Power, Access, and Legitimacy*, 59 ANTITRUST L.J. 339 (1990); Stephen Calkins, *Developments in Antitrust and the First Amendment: The Disaggregation of Noerr*, 57 ANTITRUST L.J. 327 (1988). This essay includes some of these observations in revised form and incorporates others by reference.

¹⁰ Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 744 (2000). Although antitrust cases do not stimulate

alone receives about 400 amicus briefs each year.¹¹ Amicus briefs have become so commonplace that the inevitable reaction has set in.¹²

This essay unabashedly celebrates antitrust and trade regulation amicus briefs. Ours is a small legal community. Amicus briefs are part of the way that we debate legal issues and seek to influence the law. Good amicus briefs can make a difference.¹³ Although many important antitrust cases were written without benefit of amici (the absence of which was sometimes sorely felt),¹⁴ especially in the last couple of de-

the outpouring of posturing triggered by abortion, affirmative action, and free speech, see *id.* at 831–34 (list of 34 cases with 20 or more amici briefs, 1946–95) (none antitrust), the high stakes involved in some antitrust cases can lead to vigorous amicus practice and strongly stated positions. See, e.g., *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992) (17 amicus briefs); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) (14 amicus briefs); *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (labor antitrust) (12 amicus briefs); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (international jurisdiction) (11 amicus briefs); *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990) (functional discounts) (10 amicus briefs); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (no right to contribution) (15 amicus briefs); *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176 (1980) (9 amicus briefs).

¹¹ *Kearney & Merrill*, *supra* note 10, at 752 (briefs filed per ten-year periods beginning with 1946: 1946–531; 1956–743; 1966–2042; 1976–4182; 1986–4907).

¹² Judge Posner has rebelled. “After 16 years of reading amicus curiae briefs the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinize these motions in a more careful, indeed a fish-eyed, fashion.” *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (reaffirming denial of motion to file amicus brief). (Federal Rule of Appellate Procedure 29 permits a private amicus brief only with the consent of all parties or leave of the court, and requires an intended amicus to indicate “the reason why an amicus brief is desirable.”) Reminding us that “amicus curiae” means friend of the court, not friend of a party,” he held that leave to file an amicus brief should be denied unless a party is not competently represented, the amicus has an interest in another pending case that may be affected, or the amicus “has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Id.*

¹³ See Rule 37 of the United States Supreme Court (“An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court.”); see also Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603 (1984) (discussing cases where amicus briefs made a difference); Leo Pfeffer, *Amici in Church-State Litigation*, 44 LAW & CONTEMP. PROBS., Spring 1981, at 83 (same). But cf. Andrew P. Morriss, *Private Amici Curiae and the Supreme Court’s 1997–1998 Term Employment Law Jurisprudence*, 7 WM. & MARY BILL RTS. J. 823 (1999) (little influence seen in three cases studied).

¹⁴ E.g., *United States v. Topco Assocs.*, 405 U.S. 592 (1972); *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495 (1969); *United States v. Container Corp.*, 393 U.S. 333 (1969); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *FTC v. Proctor & Gamble Co.*, 386 U.S. 568 (1967); *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); *FTC v. Borden Co.*, 383 U.S. 637 (1966); *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321 (1963); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Kelly v. Kosuga*, 358 U.S. 516 (1959); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958) (existence of amici checked by Court opinion and PHILIP B. KURLAND

cedes, amicus participation has helped shape the doctrine we apply every day.¹⁵

Amicus briefs stand out, as possibly having made a difference, in several different ways, which are considered in turn below. Sometimes an antitrust repeat player (typically the Government) takes a position that is apparently against its litigating interest or is otherwise surprising (*casting against type*). This gets noticed. Other times, it is the absence of an obvious party, or the silence of parties present, that may make a difference (*sleeping dogs*). A traditional way for amici to help is through *legal research*. One critically important function is for repeat players—again, typically the Government—to *highlight egregious errors*. Also important is for amici to supply context and *special emphasis*. Finally, the glamorous route to making a difference is through offering *analytical constructs* found appealing by a court. There are several examples of this, including, especially, in the development of the “quick look.”

I. CASTING AGAINST TYPE

Attention is drawn any time an important antitrust repeat player takes an unpredicted position. No court can lightly dismiss an amicus filing by the Antitrust Division, the FTC, or the states that recommends a resolution against their litigating interests. It should not be surprising that some of the noteworthy defense-favoring outcomes were supported

& GERHARD CASPER EDS., *ANTITRUST LAW: MAJOR BRIEFS AND ORAL ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES, 1955 TERM–1975 TERM* (1979)). Because the Solicitor General is the singularly most important antitrust amicus, amici played a relatively less important role when so much antitrust law was being crafted through Government litigation.

¹⁵ Before turning to amicus work that may have made a difference, a disclaimer is essential. All speculating about the importance of amicus work is just that—speculating. The judiciary, and especially the Supreme Court, includes some of the greatest legal minds of the day. Guessing whether a brief made a difference is inevitably problematic. One can speculate that a cited amicus brief might be likely to be regarded by a court as of a certain level of quality, but a recent study did not find that cited amicus briefs were more likely to succeed than uncited ones. Kearney & Merrill, *supra* note 10, at 811–13. See generally Susan Hedman, *Friends of the Earth and Friends of the Court: Assessing the Impact of Interest Group Amici Curiae in Environmental Cases Decided by the Supreme Court*, 10 VA. ENVTL. L.J. 187 (1991) (sample showed that only one-third of amicus citations were evidence of impact). This essay considers some interesting amicus briefs identified by selective sampling or suggested by respondents to a list-serve inquiry, and, as by examining shadows and guessing the source thereof, reflects on whether certain briefs might have made a difference. The reader is urged to consider this just part of a discussion about antitrust litigation. Readers with alternative favorite amicus briefs or differing speculations about the role of particular briefs (and especially readers who participated in litigating some of the cited cases) are warmly invited to enrich future commentary by sharing their differing perspectives with the author.

by Government amicus work. Perhaps most strikingly, it became hard to imagine that the Supreme Court would hold onto the per se rule against vertical resale price maintenance once the Antitrust Division and the FTC (led by Joel Klein and Robert Pitofsky, respectively) counseled against doing so in *State Oil Co. v. Khan*.¹⁶ There are many other examples of Government-supported opinions that favor defendants.¹⁷

Two unusual examples of amici making surprising declarations occurred in the October 1991 term. In *Kodak*, the defendant's economically sophisticated "life cycle costing" argument stumbled on real-world amicus testimony. Public purchasing officials insisted that because states require competitive bidding and governments often separate budget responsibility for purchasing and operating, "Kodak's economic theory is largely irrelevant to the real world of public purchasing."¹⁸ The Court cited the public purchasers' brief and an amicus brief filed by twenty-nine states to support its doubts about the frequency with which customers engage in effective life cycle costing.¹⁹ Similarly, in *FTC v. Ticor Title Insurance Co.*,²⁰ a state action case, five title insurance companies sought to portray themselves as champions of federalism that objected to the FTC's meddling in state regulatory matters, only to find that thirty-three states (including four of the five allegedly championed states) sided with the FTC.²¹ The Solicitor General observed that with the FTC and the states

¹⁶ 522 U.S. 3 (1997); see Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Reversal, *Khan*. But cf. Brief for Thirty-Three States and the Territory of Guam in Support of Respondents, *Khan* (contrary views to those of Solicitor General); *State Oil Co. v. Khan*, 521 U.S. 1116 (1997) (granting states' motion for leave to participate in oral argument as amici curiae).

¹⁷ E.g., *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998); *Spectrum Sports v. McQuillan*, 506 U.S. 447 (1993); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1984); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983); *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979); cf. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (Solicitor General for defendant, state attorneys general for plaintiff).

¹⁸ Brief of Amici Curiae National Ass'n of State Purchasing Officials and National Institute of Governmental Purchasing, Inc. in Support of Respondents at 8 (adding that few purchasing officials would prefer future savings to a low initial cost because life cycle costing is "notoriously difficult and imprecise"), *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

¹⁹ *Kodak*, 504 U.S. at 475; see also *id.* at 479 n.28 (citing states and a private amicus for allegations that buyers are worse off when a manufacturer controls service and parts). A brief submitted by Public Citizen, also in support of Image Technical, disagreed with Kodak's vision of how the world of purchasing works. Image Technical's lawyer thought the brief so useful that he called the Court's attention to it during oral argument. *Kodak*, Official Transcript at 40, 1991 U.S. Transcript LEXIS 213 at *35 (Dec. 10, 1991).

²⁰ 504 U.S. 621 (1992).

²¹ See Brief of Amicus Curiae States of Wisconsin et al., *Ticor*, 504 U.S. 621 (1992).

in agreement that antitrust enforcement was essential, "only the foxes are insisting that they were not left to guard the henhouse."²²

A particularly intriguing example of casting against type is provided by one of the controverted cases of the modern era, *Arizona v. Maricopa County Medical Society*.²³ This 4-3 plaintiff's victory can be better understood by recognizing the simple fact that AAG William Baxter signed an amicus brief supporting the plaintiff.²⁴ The dissenters portrayed two medical foundations as having crafted an innovative means of delivering medical care at lower prices. The plan was seen as a noncoercive way to create a new insurance product and control medical costs. Justice Powell's dissent claimed that the arrangement was indistinguishable from *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*²⁵ and that the district court had properly refused plaintiff's request for summary judgment. Four Justices—Stevens (author of the only *Broadcast Music* dissent), Brennan, Marshall, and, most importantly, Justice White (author of *Broadcast Music*)—disagreed and declared the arrangement per se illegal.²⁶

There was a change of Antitrust Division command between the filing of the Solicitor General's (SG's) amicus brief on whether to grant certiorari and his amicus brief on the merits. The first brief was filed February 18, 1981, under President Reagan, but still nominally under AAG Sanford Litvack. It was a straightforward defense of the applicability of the per se rule to the conduct in question, even going so far as to suggest considering summary reversal. Although the SG's merits brief, filed May 28, 1981 (two months after AAG Baxter had officially taken office) is quite different,²⁷ it still called for the reversal of the court of appeals, argued that *Broadcast Music* differed substantially, and declared the restraints at issue illegal without further scrutiny because the doctors' fixing of prices was not necessary to the achievement of the claimed procompetitive benefits.

The majority opinion largely follows these aspects of the SG's argument, although the points are not novel and were also made by Petitioner. The mere fact that AAG Baxter—neither a shrinking violet nor a fan of

²² Reply Brief for the Petitioner on Petition for a Writ of Certiorari at 8, *Ticor*, 504 U.S. 621 (1992).

²³ 457 U.S. 332 (1982).

²⁴ In retrospect, Bill Baxter said that he was "intensely displeased with myself and my staff" over the brief. William F. Baxter, *Preface to a Review of Antitrust Division Briefs*, 15 J. REPRINTS ANTITRUST L. & ECON. i, xvi (1985).

²⁵ 441 U.S. 1 (1979) (discussed *infra* at 653).

²⁶ *Maricopa County*, 457 U.S. at 334. Chief Justice Burger and Justice Rehnquist joined the dissent. Justices Blackmun and O'Connor did not participate.

²⁷ See *infra* at 653-54.

over-reliance on per se rules—joined in the summary condemnation of these restraints may have provided important comfort to Justice White, who supplied the key vote for what Baxter later labeled “the most serious doctrinal error that the Court made during my tenure.”²⁸

II. SLEEPING DOGS

Ironically, it is sometimes the *lack* of an amicus position that can make a difference. In *Brown v. Pro Football, Inc.*,²⁹ the SG filed an amicus brief that addressed the intersection of antitrust and labor law (in particular, the applicability of the implied labor exemption after bargaining had reached impasse). With the SG on the brief were the Antitrust Division and the FTC, but not the National Labor Relations Board. Instead, a footnote reported that the NLRB “concurs that the court of appeals’ expansive formulation of the labor exemption is wrong as a matter of law, and may do serious harm to the nation’s antitrust and labor policies if not reversed.”³⁰ As a result, Deputy Solicitor General Lawrence Wallace could not begin his argument before being asked why the National Labor Relations Board was not on the Government’s brief.³¹ When Wallace explained that the NLRB “was undergoing some transitions in membership,” a Justice acerbically asked whether the AFL-CIO had a vacancy, and noted that the lack of an amicus brief from it was “rather surprising.”³² Later, a Justice complained about an issue on which he would normally “look to the board for guidance.”³³ Still later, when a Justice noted that the NLRB disagreed with the judgment below, counsel for respondents rejoined, “But we don’t know why, Your Honor, and I suggest that part of the reasons that we don’t know why is that the board is not prepared to sign on to some of the views of the labor laws that are articulated in the Solicitor General’s brief”³⁴ The side befriended by the SG lost, 8–1.

Perhaps the most noteworthy silence by antitrust amici (and litigants) was found in *Continental T.V., Inc. v. GTE Sylvania Inc.*,³⁵ the landmark case that brought the rule of reason to all nonprice vertical restraints.

²⁸ Baxter, *supra* note 24, at xvi.

²⁹ 518 U.S. 231 (1996).

³⁰ Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioners at 13 n.10, 1995 U.S. Briefs LEXIS 338 (Jan. 19, 1996). Mine was one of the names on this brief.

³¹ 1996 U.S. TRANS LEXIS 30 at *13 (Mar. 27, 1996).

³² *Id.* at *14.

³³ *Id.* at *23–*24.

³⁴ *Id.* at *36–*37.

³⁵ 433 U.S. 36 (1977).

Although the case that marks the turning point toward modern antitrust law,³⁶ *GTE Sylvania* attracted only three amicus briefs, all private.³⁷ Those briefs supplied important special emphasis, as is discussed below,³⁸ but no advocate suggested judging vertical price restraints under the rule of reason. To the contrary, the Motor Vehicle Manufacturers wrote that the Court "need have no concern that upholding location clauses would in any way impair the validity of the *per se* rule against minimum resale price maintenance, and we explicitly disavow any such position in this brief."³⁹

In fact, it was plaintiff-petitioners who made the case for treating price and nonprice restraints the same:

The *first* salient thing about the [Ninth Circuit] majority's economic theory is that it draws no distinction between vertical price restrictions, vertical restraints on resale areas in the *Schwinn* form or vertical restraints on resale areas in the *Sylvania* form. If the economic view embraced below is accepted as the Sherman Act standard, then this Court's decisions in *Schwinn* and in *Dr. Miles* are just as wrong as was the decision by the trial judge in this case.⁴⁰

Petitioner's brief noted that "[t]he one thing that Professor Bork and economists who insist on the harmfulness of vertical restraints agree upon is that resale price fixing and resale area restraints have essentially the same purpose and effect."⁴¹ "[E]very justification that can be offered for a *Schwinn* or *Sylvania* resale restraint can as plausibly and convincingly be offered for a *Dr. Miles* restraint."⁴²

The Court dismissed the argument and reassured itself that the distinction between price and nonprice restrictions was clear and secure.⁴³ What if Respondent's amici had been more forthright about their logic and

³⁶ For discussion of the singular status of *GTE Sylvania*, see *Symposium, The Effect of GTE Sylvania on Antitrust Jurisprudence*, 60 ANTITRUST L.J. 11 et seq. (1991).

³⁷ See Motion for Leave to File Brief and Brief for Motor Vehicle Manufacturers Ass'n as Amicus Curiae (Motor Vehicle Amicus); Motion of Int'l Franchise Ass'n for Leave to File Brief Amicus Curiae (IFA Amicus); and Motion for Leave to File Brief Amicus Curiae on Behalf of the Associated Equipment Distributors, *GTE Sylvania*, 433 U.S. 36 (1977). The brief filed by the Motor Vehicle Manufacturers Association notably was signed by Harvard Law School Professor Donald F. Turner (of counsel).

³⁸ See *infra* at 640-43.

³⁹ Motor Vehicle Amicus Brief at 6 n.1; see also *id.* at 45 & n.74; IFA Amicus at 16 (per se rule for price restraints appropriate). The defendant-respondent also wrote reassuringly about the easiness of a price-nonprice distinction. See Respondent's Brief at 62-64.

⁴⁰ Brief for Petitioners at 50.

⁴¹ *Id.* at 51 n.16.

⁴² Petitioners' Reply Brief at 14.

⁴³ Subsequently, of course, critics from the academic right joined Professors Sullivan and Choper in criticizing the attempted distinction. See, e.g., Richard Posner, *The Next Step*

their preferences, and championed rule of reason treatment for all vertical restraints? Had they set forth a consistent story about the benefits they perceived from vertical price and nonprice restraints, alike, would the Court have gone along? My guess is to the contrary. A powerful amicus presentation on the identicalness of all vertical restraints effects more likely would have spooked the Court into affirming the Ninth Circuit on that court's grounds, by limiting *Schwinn* and leaving the ramifications thereof for another day. Amici were quiet, which may have made all the difference.

III. LEGAL RESEARCH

One of the classic ways that amici can help courts is through legal research.⁴⁴ Of course, when information is in the public domain, one can never know what the Court would have discovered on its own. Yet when the Court relies significantly on legal and economics secondary sources discussed by amici and not the parties, as occurred, for instance, in *Eastman Kodak Co. v. Image Technical Services, Inc.*,⁴⁵ it is at least possible that amici made a difference.

A classic example of apparent amici research assistance is found in *Bates v. State Bar of Arizona*, which held that Arizona's banning of lawyer advertising was antitrust-protected state action that unconstitutionally interfered with protected speech (lawyer advertising).⁴⁶ The Court's opinion, by Justice Blackmun, is positively scholarly in its review of the literature on the (net benefits) of lawyer advertising. Although again causation is difficult to prove, the Court may have benefited from the amicus brief filed by Solicitor General Robert Bork.⁴⁷ That brief, which recommended the outcome reached by the Court, was itself unusually compendious. Attached to it were three appendices of secondary sources, one of which

in the *Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981); Robert Bork, *Vertical Restraints: Schwinn Overruled*, 1977 SUP. CT. REV. 171.

⁴⁴ E.g., Stephen M. Shapiro, *Amicus Briefs in the Supreme Court*, 10 LITIG., No. 3 (1984). Indeed, the original common law function of amici was to identify cases with which a judge was not familiar. Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 695 (1963). For concern that amici communication of social science information (or misinformation) may mislead as well as inform, see Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91 (1993).

⁴⁵ 504 U.S. 451 (1992); see Calkins, *Revenge*, *supra* note 9, at 293–94.

⁴⁶ 433 U.S. 350 (1977).

⁴⁷ Compare, e.g., 433 U.S. at 371 ("It appears that the ban on advertising originated as a rule of etiquette and not as a rule of ethics.") (referencing H. DRINKER, *LEGAL ETHICS* 5, 210–11 (1953)) with Brief for the United States as Amicus Curiae at 28 ("The ban on advertising seems to have originated as a rule of etiquette rather than of ethics.") (referencing DRINKER).

was cited by the Court,⁴⁸ and an appendix that extended the brief's argument specifically to address lawyer advertising, parts of which which are closely echoed in the Court's opinion.⁴⁹ Although in its *California Dental Association* opinion⁵⁰ the FTC referenced some secondary sources and the *Bates* Court's salute to professional advertising, the agency must regret that an amicus failed to play for it the same explicatory role that the SG played for John Bates.

One of the best examples of effective specialized amicus legal research concerned the Fair Debt Collection Practices Act,⁵¹ and, in particular, whether that Act governed efforts by third parties to collect dishonored checks. With the district courts disagreeing on this surprisingly enigmatic question, the FTC filed an amicus brief that set out what the Seventh Circuit apparently found a compelling explication of legislative history demonstrating that the Act should be so applied.⁵² The Commission eventually filed similar amicus briefs in three other circuits,⁵³ all of which agreed with the agency and reversed contrary district courts.⁵⁴

IV. SPOTLIGHTING EGREGIOUS ERRORS

A singularly important role played by the antitrust agencies is in letting the courts know about serious mistakes. Conceivably some private parties have played this role, but the Government is usually the only entity with the credibility to claim that, looking impartially at a matter, a court got something grievously wrong.

Two of the best-known examples of the Government pointing to serious antitrust error are *Palmer v. BRG of Georgia, Inc.*⁵⁵ and *Catalano, Inc.*

⁴⁸ 433 U.S. at 370 n.22 (citing Petition of the Board of Governors of the District of Columbia Bar for Amendments to Rule X of the Rules Governing the Bar of the District of Columbia (1976), reprinted as Exhibit B to the Appendix of the SG's brief, and discussing data about consumer overestimates of costs for particular legal services).

⁴⁹ Compare 433 U.S. at 370 n.22 with SG Amicus Brief, Appendix A at 5a n.10 (referencing and quoting from same ABA report about consumer ignorance deterring use of legal services).

⁵⁰ *California Dental Ass'n*, 121 F.T.C. 190 (1996).

⁵¹ 15 U.S.C. §§ 1692-1692a.

⁵² Brief for Amicus Curiae Federal Trade Commission, *Bass v. Stolper, Koritzinsky, Brewster & Neider*, 111 F.3d 1322 (7th Cir. 1997) (available from author) (plain language and legislative history show that Act should apply to collection of dishonored checks); see *Bass*, 111 F.3d at 1327 n.8 (discussing FTC amicus brief). The Seventh Circuit appeared to rely heavily on the Commission's chronicling of a rejected meaning in a subsequently replaced bill, see FTC Amicus Brief at 5-7. Ernest J. Isenstadt, then-FTC Assistant General Counsel, was principally responsible for the brief.

⁵³ The briefs are available at <http://www.ftc.gov/ogc/briefs.htm>.

⁵⁴ *Snow v. Jesse L. Riddle, P.C.*, 143 F.3d 1350 (10th Cir. 1998); *Duffy v. Landberg*, 133 F.3d 1120 (8th Cir. 1998); *Charles v. Lundgren & Assocs., P.C.*, 119 F.3d 739 (9th Cir. 1997).

⁵⁵ 498 U.S. 46 (1990) (per curiam). The case is discussed in Calkins, *supra* note 9.

*v. Target Sales, Inc.*⁵⁶ In *Palmer*, the Court's per curiam reversal of the Eleventh Circuit reads like a straightforward reaffirmation of the per se rule against horizontal market division. The picture is one of doctrinal tranquility—just as a duck gliding over a pond may seem graceful in spite of its furious paddling below the surface.

Although the factual complexity underlying *Palmer*⁵⁷ was unimportant to antitrust law, the court of appeals had erred importantly when it affirmed the district court's conclusion (on summary judgment) that it was not unlawful for geographically adjacent competitors to agree to refrain from entering each other's territory. The United States and the FTC illuminated the error in an amicus brief that pointedly recommended the granting of certiorari and summary reversal.⁵⁸

Although the court of appeals' treatment of the per se claims in this case is erroneous and apparently in conflict with this Court's longstanding precedents concerning the per se rule, we nevertheless do not urge plenary review. If, as we believe, the court of appeals did radically misinterpret and misstate governing precedent concerning the application of the per se rule to horizontal conspiracies, its errors are so clear as to require no further briefing or argument in this Court. . . . Moreover, we see no useful purpose to be served by further review of this case merely to resolve ambiguity concerning which path the courts below took in going astray.⁵⁹

The Supreme Court, with only Justice Marshall dissenting (based on his longstanding objection to the use of summary procedures) and Justice Souter not participating, agreed.

In *Catalano*, the SG and thirty-eight states protested the Ninth Circuit's undermining of the per se rule by evaluating horizontal agreements to eliminate short-term credit under the rule of reason. The SG wrote that the "court of appeals' holding that a conspiracy to eliminate free trade credit is not a form of price fixing is both erroneous and important."⁶⁰ A strong (and correct) dissent had already improved the chances for certiorari. The SG suggested that the Court might want to consider summary reversal,⁶¹ which it did several months later.

Spotlighting egregious errors occurs not just at the Supreme Court level but at the court of appeals level as well. Indeed, the antitrust

⁵⁶ 446 U.S. 643 (1980) (per curiam).

⁵⁷ See Calkins, *Toward Greater Certainty*, *supra* note 9, at 606 n.13.

⁵⁸ Brief for the United States [with the FTC] as Amicus Curiae, *Palmer*, 498 U.S. 46 (1990).

⁵⁹ *Id.* at 15.

⁶⁰ Memorandum for the United States as Amicus Curiae at 4, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

⁶¹ *Id.* at 7 n.5.

agencies may play a more decisive role at lower levels of the judicial system. The Supreme Court expects to hear the Government's views on almost every case, and usually retains sufficient accumulated antitrust expertise to recognize obvious mistakes. Not so the courts of appeal.

Although attempts to alert courts of appeal to clear errors are not always successful (for instance, the Antitrust Division unsuccessfully supported rehearing en banc in *Palmer*⁶²), there have been some noteworthy success. Three that stand out are *Systemcare, Inc. v. Wang Laboratories Corp.*,⁶³ *Columbia Steel Casting Co. v. Portland General Electric Co.*,⁶⁴ and *Surgical Care Center of Hammond, L.C. v. Hospital Service District No. 1*.⁶⁵

Systemcare reflected a determined effort to beat back a mischievous and potentially pernicious undermining of antitrust enforcement. The Tenth Circuit, giving an unusual meaning to the word "agreement," had said that a tying agreement between a buyer and seller was not an "agreement" for purposes of Sherman Act Section 1.⁶⁶ When a district court squarely so read Tenth Circuit case law,⁶⁷ the Antitrust Division urged the Tenth Circuit to interpret those cases in a more limited fashion.⁶⁸ After a Tenth Circuit panel, with some justification, ruled that the Division's interpretation was "unnecessarily tortured,"⁶⁹ the Division successfully supported rehearing en banc.⁷⁰ In its brief supporting rehearing and its subsequent merits brief, it set forth the mischief that the panel's opinion could work on the law of exclusive dealing, resale price

⁶² Brief for the United States as Amicus Curiae, at 7 n.6, 1989 U.S. Briefs LEXIS 1667 (Sept. 17, 1990), *Palmer*, 498 U.S. 46 (1990). For an unsuccessful argument that a court of appeals had improperly upheld an award of summary judgment based on claimed easy entry, see Brief for Amicus Curiae United States in Support of Appellant, *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191 (3d Cir. 1995), available at <http://www.usdoj.gov/atr/cases/f0400/0477.htm>. See *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 1995 U.S. App. LEXIS 10775 (May 11, 1995) (denying petition for rehearing en banc).

⁶³ 117 F.3d 1137 (10th Cir. 1997) (en banc).

⁶⁴ 111 F.3d 1427 (9th Cir. 1997), cert. denied, 523 U.S. 1112 (1998).

⁶⁵ 171 F.3d 231 (5th Cir.) (en banc), cert. denied, 120 S. Ct. 398 (1999).

⁶⁶ See *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641 (10th Cir. 1992); *McKenzie v. Mercy Hosp.*, 854 F.2d 365 (10th Cir. 1988).

⁶⁷ *Systemcare, Inc. v. Wang Labs. Corp.*, 787 F. Supp. 179 (D. Colo. 1992), *aff'd*, 85 F.2d 465 (10th Cir. 1996), *vacated*, 117 F.3d 1137 (10th Cir. 1997) (en banc).

⁶⁸ Brief for Amicus Curiae United States of America in Support of Appellant, *Systemcare, Inc. v. Wang Laboratories Corp.*, 85 F.3d 465 (10th Cir. 1996), available at <http://www.usdoj.gov/atr/cases/f0400/0480.htm>.

⁶⁹ 85 F.3d at 470.

⁷⁰ Brief for Amicus Curiae United States of America in Support of Rehearing En Banc (June 11, 1996), *Systemcare*, 117 F.3d 1137 (10th Cir. 1997), available at <http://www.usdoj.gov/atr/cases/f0600/0681.htm>.

maintenance, and all of vertical restraints.⁷¹ The en banc Tenth Circuit unanimously vacated the panel opinion and overruled prior Tenth Circuit case law.⁷²

One of the more dramatic instances of Antitrust Division intervention occurred in *Columbia Steel*. The Ninth Circuit had ruled that private conduct was immunized by the state action doctrine "if it is a foreseeable result of state agency action and if circumstances justify an inference that the agency intended to authorize the conduct."⁷³ The Antitrust Division filed a brief in support of rehearing that carefully set forth the nature of the error made⁷⁴ and made clear that this was serious error.⁷⁵ Persuaded, the court withdrew its previous opinion and replaced it with an opinion changing the case's outcome:

We are persuaded by Columbia Steel's petition for rehearing and an amicus curiae brief filed by the Antitrust Division of the department of Justice that we erred in allowing a foreseeability test to be substituted for the clear articulation test of *Midcal*

....

As the Antitrust Division puts it, 'express authorization [is] the necessary predicate for the Supreme Court's foreseeability test.' PGE cites no case to the contrary and we know of none.⁷⁶

Any time a court is turned around that sharply and with that amount of attention to the Government's views, one has to suspect that the Government made a difference.

A similarly sharp reversal of position occurred in *Surgical Care*, although the importance of the Government's role is less strikingly clear. A panel

⁷¹ *Id.* at 10–11; *En Banc* Brief for the United States as Amicus Curiae in Support of Appellant at 15–17 (Oct. 4, 1996), available at <http://www.usdoj.gov/atr/cases/f0900/0944.htm>.

⁷² *Systemcare, Inc. v. Wang Labs. Corp.*, 117 F.3d 1137 (10th Cir. 1997) (referring to the Division's brief).

⁷³ *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 60 F.3d 1390 (9th Cir. 1995).

⁷⁴ Brief Amicus Curiae of the United States of America in Support of Petition for Rehearing at 9 (Aug. 15, 1985) ("While the Supreme Court's [foreseeability] test is whether the anticompetitive effects are a foreseeable result of authorized conduct, the panel asked whether the 'private conduct . . . is a foreseeable result of state agency action.'"), *Columbia Steel*, 111 F.3d 1427 (9th Cir. 1997).

⁷⁵ *Id.* at 8 ("the panel's standard . . . departs from the Supreme Court's formulation, misconceives the foreseeability test, and fails to achieve the Court's purposes in imposing the requirement").

⁷⁶ 111 F.3d at 1443–44 (brackets by court; citation to Division brief omitted). When the defendant subsequently sought certiorari, the Court invited the views of the United States, 522 U.S. 803 (1997), which were duly filed (successfully recommending denial of certiorari). Brief for United States as Amicus Curiae, *Portland General Elec. Co. v. Columbia Steel Casting Co.*, (Apr. 15, 1998), 523 U.S. 1112 (1998), available at <http://www.usdoj.gov/atr/cases/f1600/1637.htm>.

had ruled that a hospital service district (which it considered a political subdivision) enjoyed antitrust immunity "if its anticompetitive conduct is the foreseeable result of the statutory scheme."⁷⁷ Although this ruling found support in some Supreme Court language,⁷⁸ it would immunize a great deal. The two antitrust agencies pointed this out (in a brief supporting rehearing en banc) by referencing Adam Smith's observation about the predictability of efforts to lessen competition.⁷⁹ In that brief and a subsequent brief on the merits, the agencies warned of the "dangerous consequences" of a rule silently conferring immunity for any attempted lessening of competition pursuant to a mere authorization for a political subdivision to compete in the marketplace.⁸⁰ A unanimous en banc Fifth Circuit agreed and reversed the judgment of dismissal that had previously been upheld.⁸¹

V. SPECIAL EMPHASIS

Sometimes an amicus brief can emphasize an aspect of a case so effectively that the case appears quite different than it otherwise might. Without necessarily introducing whole new themes, amici have underscored and developed points, added examples, and given depth to the picture presented. Such cases include *Klor's, Inc. v. Broadway-Hale Stores, Inc.*⁸² and *Continental T.V., Inc. v. GTE Sylvania Inc.*⁸³

⁷⁷ 153 F.3d 220, 223 (5th Cir. 1998), *rev'd*, 171 F.3d 231 (5th Cir.) (en banc), *cert. denied*, 120 S. Ct. 398 (1999).

⁷⁸ See *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 373 (1991) ("It is enough . . . if suppression of competition is the 'foreseeable result' of what the statute authorizes.") (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 33, 42 (1985)).

⁷⁹ Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Suggestion of Rehearing En Banc at 8 n.3, *Surgical Care Center*, 171 F.3d 231, available at <http://www.usdoj.gov/atr/cases/f2000/2052.htm>.

⁸⁰ *Id.* at 9; Supplemental *En Banc* Brief for the United States and the Federal Trade Commission as Amici Curiae Urging Reversal in Support of Appellant, at 18, *Surgical Care Center*, 171 F.3d 231, available at <http://www.usdoj.gov/atr/cases/f2200/2229.htm>.

⁸¹ 171 F.3d at 235 (pointing to the subtle but important distinction "between a statute that in empowering a municipality necessarily contemplates the anticompetitive activity from one that merely allows a municipality to do what other businesses can do"). The same issue had been raised in another Fifth Circuit case, *Willis-Knighton Medical Center v. City of Bossier City*, 2 F. Supp. 2d 842 (W.D. La. 1997), *rev'd without opinion*, 178 F.3d 1290 (5th Cir. 1999), in which the two antitrust agencies also filed an amicus brief. Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Appellant, *Willis-Knighton* 178 F.3d 1290, available at <http://www.usdoj.gov/atr/cases/f1600/1621.htm>. The court of appeals reversed the district court without opinion shortly after issuing its opinion in *Surgical Care*.

⁸² 359 U.S. 207 (1959).

⁸³ 433 U.S. 36 (1977).

A. Klor's

Klor's is the famous boycott case which long led a Janus-faced existence as alternatively a horizontal and a vertical case.⁸⁴ Petitioner focused attention on the harm done to a "single trader," on "the use of monopoly chain buying power by a large interstate competitor who has sought to eliminate the competition of the petitioner," and on the defendants' alleged "specific intent to monopolize."⁸⁵ The Solicitor General refocused attention on the allegation that "10 manufacturers and their affiliated distributors had conspired with each other and with petitioner's competitor" and the absence of any efficiency justification for the boycott.⁸⁶ Philip Elman, from the SG's office, made this clear early in his argument, describing an allegation of "a 'suppliers' group boycott," which, among other things, "restrains competition among the parties to the agreement" because "[t]hey are no longer competing with one another" for Klor's business.⁸⁷ Elman made sure the Court realized that it was looking at a horizontal concerted refusal to deal without any asserted efficiency justification.⁸⁸

B. GTE SYLVANIA

Another good example is provided by *Continental T.V., Inc. v. GTE Sylvania Inc.*, the vehicle for the Court to undo the mischief it had caused when, in *United States v. Arnold, Schwinn & Co.*,⁸⁹ it had gone beyond the argument of the Justice Department and held that a manufacturer's restraints on resale were per se illegal when a manufacturer sought to impose them after parting with title. GTE Sylvania was a struggling firm

⁸⁴ See, e.g., Brief for the United States as Amicus Curiae Supporting Reversal (Nov. 11, 1984) at 7 n.11, available in LEXIS ("There is disagreement over the extent to which the horizontal or vertical nature of the restraint should determine whether the per se rule is applied.") (citing authorities), *Northwest Wholesale Stationers*, 472 U.S. 284 (1984).

⁸⁵ Petitioner's Opening Brief at 4, 16 (question presented and summary of argument), *Klor's*, 359 U.S. 207 (1959).

⁸⁶ Brief for the United States as Amicus Curiae at 4, 11.

⁸⁷ Transcript of Oral Argument at 9; see also *id.* at 16-17 ("But in this case you've got a little man across the street from . . . Macy's saying that Macy's went to all his big suppliers and said to them: You enter an agreement with each other binding each of you not to sell to this little fellow across the street from me, for reasons . . . which are not specifically alleged in the complaint.").

⁸⁸ The clarity of the issue before the Court in *Klor's* makes it particularly unfortunate that courts and commentators subsequently debated whether *Klor's* turned on horizontal (as opposed to merely vertical) agreement. Only two years ago, a party urged the Court to treat *Klor's* as applicable also to vertical agreement—an invitation it declined while putting the issue firmly to rest. Brief for Respondent, at 19, *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998); see also *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 734 (1988) (describing *Klor's* as horizontal case).

⁸⁹ 388 U.S. 365 (1967).

that sought to preserve a distribution network by preventing too-free transshipping, and the Ninth Circuit had thought this distinguished the situation from *Schwinn*. Boalt Hall Law Professors Jesse Choper and Lawrence A. Sullivan, with a private practitioner, viewed this as an assault on *Schwinn* calling for the Court's attention and petitioned for certiorari. The petition ends with a ringing challenge: "If *Schwinn* is to be overruled, it should be overruled by this Court, and overruled candidly"⁹⁰

The Court accepted the challenge. Given the changed composition of the Court,⁹¹ the tide of criticism that had washed over *Schwinn* in the decade it had been on the books, and the attractiveness of the competitively tiny GTE Sylvania's story, the granting of certiorari in *GTE Sylvania* probably sounded the death knell of *Schwinn*. Even if its death was inevitable, however, the nature of its burial was unresolved.

Although the *GTE Sylvania* amici did not make novel arguments or uncover unusual facts, they supplied emphasis and detail.⁹² Respondent GTE was obliged to defend the Ninth Circuit's decision to distinguish *Schwinn*, and only argued in the alternative for its overruling.⁹³ The Motor Vehicle Manufacturers Association (MVMA) was not similarly constrained and led with the essential argument:

This *amicus* brief also sets forth the underlying economic principles which support the assertion that the use by manufacturers of vertical restraints on the locations of dealers may be beneficial to competition and consumer welfare. A manufacturer and the consumers of its product want the same thing from a distributional system: maximum effec-

⁹⁰ Petition for Certiorari at 22, *GTE Sylvania*, 433 U.S. 36:

If *Schwinn* is to be overruled, it should be overruled by this Court, and overruled candidly; it should not be dispatched by the court below in a specious majority opinion. If *Schwinn* is to be modified, it should be modified by this Court, with deliberation, not left to unravel as other courts and commentators, encouraged by the decision below, begin to pick at it. If *Schwinn* is to remain the law, this Court must clearly teach that the majority below is wrong and does not have the power to reduce *Schwinn* to a legal exercise devoid of force or principle.

⁹¹ Only Justice Brennan remained from the five-member *Schwinn* majority.

⁹² As discussed above at 632, amici also may have made a difference by refraining from advocating rule of reason treatment for price restraints. Respondent and amici alike spilled much ink setting forth the deficiencies and ill-repute of the line *Schwinn* had drawn for per se illegality. The Court joined in the chorus. It noted that, "as one commentator has observed, many courts 'have struggled to distinguish or limit *Schwinn* in ways that are a tribute to judicial ingenuity.'" 433 U.S. at 48 n.14 (quoting Robinson, *Recent Developments: 1974*, 75 COLUM. L. REV. 243, 272 (1975)). It quoted Donald Baker's charge that *Schwinn* was "'an exercise in barren formalism' that is 'artificial and unresponsive to the competitive needs of the real world.'" 433 U.S. at 48 n.13 (quoting Donald Baker, *Vertical Restraints in Times of Change: From White to Schwinn to Where?*, 44 ANTITRUST L.J. 537 (1975)).

⁹³ Brief for Respondent GTE Sylvania at 51-65, *GTE Sylvania*, 433 U.S. 36.

tiveness at minimum cost. Every manufacturer has an economic interest in having its product marketed effectively at the lowest possible cost.⁹⁴

This equating of manufacturer and consumer interests was a central aspect of *GTE Sylvania*.⁹⁵ Although the same point was also made by respondent,⁹⁶ the MVMA highlighted the point by putting it up front and then hammering it home through repetition and reemphasis.⁹⁷

Also important to *GTE Sylvania* was the Court's explanation that "[v]ertical restrictions promote interbrand competition" and permit the achievement of "efficiencies."⁹⁸ The Court mentioned the aiding of new competitors, promotional activities, service and repair functions, warranty obligations, and "the so-called 'free-rider' effect."⁹⁹ This theme was included in Respondent's brief, which posited that "non-price vertical restraints may, and frequently do, promote interbrand competition."¹⁰⁰ It was elaborated on importantly by amici. The MVMA wrote at length about the benefits of limiting distribution, discussing servicing, the federal warranty law referenced by the Court, and the dollar magnitude of the dealer investments that need to be encouraged.¹⁰¹ It thoroughly

⁹⁴ Motor Vehicle Amicus at 3.

⁹⁵ 433 U.S. at 56 & n.24:

Economists also have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products. . . . In this context, a manufacturer is likely to view the difference between the price at which it sells to its retailers and their price to the consumer as its "cost of distribution," which it would prefer to minimize.

(quoting Richard Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential competition Decisions*, 75 COLUM. L. REV. 282, 283 (1975), and citing Robert Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division [II]*, 75 YALE L.J. 373, 403 (1966)).

⁹⁶ Respondent quoted a student note that the Court also quoted: "Generally a manufacturer would prefer the lowest retail price possible, once its price to dealers has been set, because a lower retail price means increased sales and higher manufacturer revenues." Note, 88 HARV. L. REV. 636, 641 (1975), quoted in Brief for Respondent at 47 and 433 U.S. at 56 n.24.

⁹⁷ Motor Vehicle Amicus at 44 ("the manufacturer has an interest in getting the product distributed in the most efficient and effective way possible"); *id.* at 46 ("manufacturers may be presumed to select the most efficient, least costly means of distribution, for it is in their economic interest to do so").

⁹⁸ *Id.* at 54.

⁹⁹ 433 U.S. at 55.

¹⁰⁰ Respondent's Brief at 59 (citing, among other authorities, Preston, *Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards*, 30 LAW & CONTEMP. PROB. 506 (1965), which the Court, 433 U.S. at 55, cited for the same point); see also *id.* at 45 n.38 (discussing a California warranty act also cited by the Court, 433 U.S. at 55 n.23); *id.* at 46 (quoting student note explaining how location clauses can help weaker manufacturers achieve distribution).

¹⁰¹ Motor Vehicle Amicus at 9–24.

reviewed "free-riding," citing the two authorities subsequently referenced by the Court.¹⁰²

Ironically, for all the legal talent that worked as advocates in *GTE Sylvania*, some of the Court's most important expressions of views are not tightly rooted in the briefs of parties or amici. The ringing assertion that "[i]nterbrand competition is . . . the primary concern of antitrust law"¹⁰³ had profound implications for distribution law. One can find support for the concept, but not the declaration itself, in the briefs.¹⁰⁴ More fundamentally, *Schwinn* was the case in which the Court wedded antitrust to modern economics. The Court declared "that departure from the rule-of-reason standard must be based upon demonstrable economic effect, rather than—as in *Schwinn*—upon formalistic line drawing."¹⁰⁵ It squarely rejected Ninth Circuit Judge Browning's concern for "the autonomy of independent businessmen."¹⁰⁶ "Competitive economies have social and political as well as economic advantages, but an antitrust policy divorced from market considerations would lack any objective benchmarks."¹⁰⁷ Given the Court's setting out these views that lack close parallels in the briefs, it would be rash to claim that amici influenced the Court's opinion.¹⁰⁸ One can say, however, that amici

¹⁰² Compare Motor Vehicle Amicus at 18 (citing Posner, *supra* note 95, at 285, and PAUL SAMUELSON, ECONOMICS 506–07 (10th ed. 1976)) with 433 U.S. at 55 (citing same pages). Respondent had also relied on Posner to make its "free-riding" argument. Respondent's Brief at 62. The International Franchise Association also highlighted both "free-riding" and the problem of the struggling competitor. IFA Amicus at 17–18.

¹⁰³ 433 U.S. at 52 n.19.

¹⁰⁴ Cf. Respondent's Brief at 61 ("To posit that this consequence of the *Schwinn per se* language yields increased intrabrand competition misses the point. For the issue, surely, is not the mere enhancement of such 'competition', but whether it is the type of competition which, as a matter of antitrust policy, ought to be preserved, particularly when the cost of so doing is injury to other forms of competition. We respectfully suggest that it is not, at least on a *per se* basis.").

¹⁰⁵ 433 U.S. at 58–59.

¹⁰⁶ *Id.* at 53 n.21.

¹⁰⁷ *Id.* (citation omitted).

¹⁰⁸ Any speculation about Justice Powell's opinion for the Court in *GTE Sylvania* needs to note that Tyler Baker, a former student of Bill Baxter later to head Baxter's Guidelines project, clerked for Justice Powell at the time. See Richard Schmalensee, *Bill Baxter in the Antitrust Arena: An Economist's Appreciation*, 51 STAN. L. REV. 1317, 1328 n.41 (1999).

Also missing from the *GTE Sylvania* briefs was much discussion about just how courts were supposed to go about the prescribed balancing of harm to intrabrand competition against gain to interbrand competition. Cf. Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67, 68 (1991) ("Courts, and indeed economists, are ill equipped to carry out the Supreme Court's instruction to balance the conflicting effects that economic theory attributes to vertical restraints, much less to determine whether the net result of a particular restraint is on balance to impede or to 'promote[] competition.'") (citing *GTE Sylvania*, 433 U.S. at 49 n.15). Petitioners warned that "where, as here, a restraint has been imposed on intra-brand competition, the Court

presented the kind of emphasis and detail that could have made a difference.

VI. ANALYTICAL CONSTRUCTS

The most glamorous role for an amicus is to contribute an analytical approach so powerful that the Court is inspired to adopt it as its own. This is the stuff of law professor dreams. Such dreams are rarely fulfilled. Surely, most such briefs sparkle briefly and then expire, forgotten if not unnoticed.¹⁰⁹

Although antitrust has its share of examples of amicus briefs that sought to cause profound change and appeared simply not to connect,¹¹⁰

should not set sail on a sea of speculation in a prophetic effort to tell whether the resulting injury is offset by asserted benefits to interbrand competition." Petitioners Brief at 39-40, *GTE Sylvania*. "To require the jury to struggle with such a non-justiciable issue, would enhance the risk of irrational or invidious decisions." *Id.* at 26. Respondent tut-tutted that "concern over judicial efficiency is no substitute for reasoned antitrust policy," and suggested that the process of netting out competitive effect was no more difficult than other challenges that confront antitrust tribunals. Respondent's Brief at 48-49; *see also* IFA Amicus at 29-30 ("Finally the nature of the inquiry into the reasonableness of a vertical territorial restraint is well understood.") (listing series of factors to consider). The Court agreed with Respondent that such balancing was a proper judicial function. 433 U.S. at 57 n.27.

Although amici did not shed much light on just how courts were to engage in the assigned balancing, the Motor Vehicle Manufacturers Association was more transparent than the Respondent or the Court about the likely outcome of such an approach, namely, near-per se legality for nonprice vertical restraints: Judged under the rule of reason, "such restraints will ordinarily be upheld, since the manufacturer will normally employ them to increase efficiency, competition, and consumer welfare. . . . [A]bsent unusual circumstances that give a plausible reason to expect anticompetitive effects, genuinely vertical restraints imposed by a manufacturer on the scope or focus of dealer sales efforts should be upheld as reasonable." Motor Vehicle Amicus at 44. Indeed, MVMA argued that "since the primary (though improbable) anticompetitive danger is that ostensibly vertical restrictions may occasionally turn out to be horizontal restraints instigated by dealers and forced by them on the manufacturer, there is probably less necessity for antitrust scrutiny of marketing restrictions imposed by large and powerful manufacturers." *Id.* at 46 n.77.

¹⁰⁹ One of many such examples is provided by *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), an unusually complicated international insurance antitrust case that attracted a glamorous crop of amicus participants, most of whom cannot claim to have been ultimately persuasive. *See* Calkins, *The October 1992 Supreme Court*, *supra* note 9, at 355 et seq.

¹¹⁰ *See, e.g.*, Brief of Amici Curiae Law Professors in Support of Respondent, at 3 (ten antitrust professors vainly urged the Court to affirm the court of appeals and adopt "harsh treatment" for any "agreement to eliminate a competitor from the market"), *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998), 1996 U.S. Briefs LEXIS 1570, at *6-*9 (June 23, 1998); Brief for the Service Station Dealers of America as Amicus Curiae Supporting Affirmance (attempting to interest the Court in a claimed link between franchiser power and maximum RPM), *State Oil Co. v. Khan*, 522 U.S. 3 (1997). For a Solicitor General brief recommending a mode of analysis that the Court ignored in its opinion, *see* Brief for the United States as Amicus Curiae Supporting Reversal (Nov. 15, 1994), *Northwest Wholesale Stationers*, 472 U.S. 284 (1984) (recommending "quick look" treatment for group boycott cases); *cf.* Transcript of Oral Argument (Justices expressed uneasiness with

antitrust also has its share of briefs that suggested an analytical structure that was consistent with the thinking of the Court. Examples include *Cantor v. Detroit Edison Co.*,¹¹¹ *McLain v. Real Estate Board of New Orleans, Inc.*,¹¹² and, from the Bill Baxter years, *Copperweld Corp. v. Independence Tube Corp.*,¹¹³ *Associated General Contractors of California, Inc. v. California State Council of Carpenters*,¹¹⁴ and the concurrence in *Jefferson Parish Hospital District No. 2 v. Hyde*.¹¹⁵ The Baxter years also saw the controversial amicus brief in *Monsanto Co. v. Spray-Rite Service Corp.*,¹¹⁶ whose prescription of rule of reason treatment for resale price maintenance so inflamed Congress that the Division was forbidden from expending resources to advance the position¹¹⁷—but whose cautions about the risks of too-quickly finding RPM agreements may have influenced the Court to issue what is now widely understood as a very pro-defendant decision.¹¹⁸ Those

approach), *Northwest Wholesale Stationers*.

In *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), the Court agreed with the Solicitor General (for the Antitrust Division and the FTC) that the court of appeals's judgment should be reversed and private plaintiffs seeking injunctive relief required to show a threat of antitrust injury, but it squarely rejected the SG's recommendation that it "adopt in effect a *per se* rule 'denying competitors standing to challenge acquisitions on the basis of predatory pricing theories.'" 479 U.S. at 121 (quoting Brief for the United States as Amicus Curiae at 25). The Court wrote that there was ample evidence that predatory pricing occurs, and, even if it occurs infrequently, "[i]t would be novel indeed for a court to deny standing to a party seeking an injunction against threatened injury merely because such injuries rarely occur." 479 U.S. at 121. As Justice Scalia observed during an oral argument in which the Court was conspicuously unreceptive to the Government's views, the equivalent would be "to say, it's very unlikely that a little man will beat up a big man; and therefore, we will not allow any tort actions by big men asserting that they've been assaulted by little men." 1986 U.S. TRANS LEXIS 22, at 20 (Oct. 16, 1986) (Scalia identified in oralist's answer). (At the end of that argument, counsel for plaintiff was explaining that he had "looked at Professor Areeda" and concluded that standing for a competitor was not a serious question. The Court's last word was, unhappily for counsel, "The Professor is on your opponent's brief." *Id.* at *46).

¹¹¹ 428 U.S. 579 (1976).

¹¹² 444 U.S. 232 (1980).

¹¹³ 467 U.S. 752 (1984).

¹¹⁴ 459 U.S. 519 (1983).

¹¹⁵ 466 U.S. 2, 54 (1984) (O'Connor, J., concurring).

¹¹⁶ 465 U.S. 752 (1984).

¹¹⁷ Congress responded to the Division's call for an end of the *per se* rule against RPM (in the SG's brief on the petition and his brief on the merits) by preventing the Justice Department from expending funds to advance this position. Justice O'Connor ended Assistant Attorney General Baxter's oral argument by wryly asking, "Mr. Baxter, had Congress not adopted the proviso in its appropriation act, would you have made possibly a different argument to us today?" Baxter responded, "We have not withdrawn part 2(b) of our brief, Justice O'Connor. Beyond that I would prefer not to deal with that question." 1983 U.S. TRANS LEXIS 18, at *21. See Frederick R. Warren-Boulton, *Resale Price Maintenance Reexamined: Monsanto v. Spray-Rite (1984)*, in *THE ANTITRUST REVOLUTION: THE ROLE OF ECONOMICS* 400, 418 (John E. Kwoka, Jr. & Lawrence J. White eds., 2d ed. 1994).

¹¹⁸ See Baxter, *supra* note 24, at xvii–xix; see also *id.* at xix ("the opinion in *Monsanto* will assist lower courts in disposing of a substantial fraction of cases involving harmless distributional restraints with a sensible result if not with a sensible opinion").

years also saw the start of the amicus aiding of the development of the "quick look," which merits separate attention.

A. *CANTOR V. DETROIT EDISON*

Amici assistance is most likely to be critical when a litigant fails to connect with the interests of the Court. This happened in *Cantor v. Detroit Edison Co.*,¹¹⁹ the state action case that ruled that a Michigan utility's supplying of light bulbs to its customers was not exempt from the antitrust laws even though included in a state regulatory tariff. The lawyer for petitioner drug store commenced his oral argument with an exegesis on "lamps,"¹²⁰ and never really recovered. To the obvious exasperation of the Court, he spent almost all of his time arguing that the Michigan Public Service Commission, the district court, and the court or appeals had all erred in concluding that the Commission had state-law authority to approve the challenged light bulb distribution plan.¹²¹

The real deliberations concerned the view of Solicitor General Robert Bork (with AAG Thomas Kauper). The Court asked Respondent's counsel whether he agreed with the SG's interpretation of *Parker v. Brown*,¹²² it asked about the SG's argument that previous changes in the utility's program had not led to changes in the tariff,¹²³ and counsel for a group of Michigan utilities who was permitted to argue made clear that his

The essence of *Monsanto* is in the Court's highlighting of "two important distinctions"—between "concerted and independent action" and "between concerted action to set prices and concerted action on nonprice restrictions"—and in its requirement of "evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." 465 U.S. at 760–61 & 764. The brief that this most strongly echoes is the SG's brief supporting the petition for certiorari. See Brief for the United States as Amicus Curiae in Support of Petitioner at 5 & 8, available in LEXIS ("Section 1's crucial distinction between collective and unilateral conduct . . ."; "distinction between 'non-price' and 'price-related' vertical restrictions"; "To infer concerted action . . . thus requires a showing that the conduct is not in the individual self-interest of the participants, acting independently, and is in their collective self-interest only when they coordinate their actions.") (footnote omitted).

¹¹⁹ 428 U.S. 579 (1976).

¹²⁰ Transcript of Oral Argument at 1, reprinted in 36 PHILIP B. KURLAND & GERHARD CASPER EDS., ANTITRUST LAW: MAJOR BRIEFS AND ORAL ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES, 1955 TERM–1975 TERM at 923 (1979).

¹²¹ Transcript at 5 ("But presumably the Michigan Public Service Company has decided it had that authority, Judge Feikens, who was a Michigan lawyer sitting on the bench in Detroit, ruled against you; the Sixth Circuit which handles a lot of Michigan cases likewise ruled against you. You wouldn't ask this Court to superimpose its judgment of Michigan law against them would you?"). When counsel finally mentioned *Parker v. Brown*, the Court wryly noted, "It's the relevant issue here; you may as well argue it." *Id.* at 8.

¹²² *Id.* at 22.

¹²³ *Id.* at 24.

purpose was to join issue with the SG.¹²⁴ The SG argued that the mere fact that a state commission had encapsulated its acquiescence in an order did not make private compliance therewith sufficiently compelled, and the Court agreed.¹²⁵

B. *McLAIN V. REAL ESTATE BOARD*

Petitioners in *McLain v. Real Estate Board of New Orleans, Inc.*¹²⁶ submitted a fact-specific brief arguing that the challenged restraint affected commerce. In contrast, Judge Easterbrook, then-Deputy Solicitor General, challenged the Court to take seriously its language about the reach of the Sherman Act.¹²⁷ The Government's brief opened by discussing the reach of the Sherman Act, reviewed the incredible breadth of Congressional power, and then described the real estate business's effect on interstate commerce. The brief concluded: "Congress thus has the power, under the Commerce Clause, to regulate the affairs of real estate brokers. And because the Sherman Act expresses all the power Congress possesses, it applies to the market in realty services."¹²⁸

The Supreme Court apparently was impressed with this argument. Chief Justice Burger's opinion noted the breadth of the Commerce Clause and the "corresponding broad reach of the Sherman Act."¹²⁹ The Court then seemed to adopt the Solicitor General's view that it was sufficient that the brokerage business be in interstate commerce:

To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect

¹²⁴ *Id.* at 38; see also Motion for Leave to File Brief as Amicus Curiae and Brief of the Michigan Utilities Group at 20-25, 31-39 (extensive discussion of SG views).

¹²⁵ 428 U.S. at 598 ("We conclude that neither Michigan's approval of the tariff filed by respondent, nor the fact that the lamp-exchange program may not be terminated until a new tariff is filed, is a sufficient basis for implying an exemption from the federal antitrust laws for that program.") (footnote omitted).

¹²⁶ 444 U.S. 232 (1980).

¹²⁷ Letter from Judge Frank H. Easterbrook to Stephen Calkins (Sept. 9, 1991) (on file with author) (The brief was written "to see whether the Supreme Court was willing to take seriously its oft-repeated, but never followed assertion that the Sherman Act exercises Congress' full powers under the Commerce Clause." If the Sherman Act *does* exercise that power, that should virtually end the discussion. "And if the Sherman Act exercises less than the whole national power, I hoped the Court would say so and stop the pretense.").

¹²⁸ Brief for the United States as Amicus Curiae, text accompanying n. 18, *McLain*, 444 U.S. 232 (1982). Easterbrook explained that "if the Sherman Act expresses all of the power Congress has to exercise, and if, as the Court of Appeals held, the Sherman Act does not apply to the activities of brokers at all, it must follow that Congress has no power over brokers. That seems an extraordinary proposition . . ." *McLain*, 1979 U.S. Transcript LEXIS 16 (Nov. 6, 1979).

¹²⁹ 444 U.S. at 241.

on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful.¹³⁰

Moreover, the Court's application of this legal standard considered merely the real estate business in general, and easily concluded that plaintiffs deserved to be heard at trial.

Had the Court stopped there, the dicta about the reach of the Sherman Act would have prevailed, and the commerce requirement would have been stripped of its importance. The Court continued, however:

To establish federal jurisdiction in this case, there remains only the requirement that respondents' *activities which allegedly have been infected* by a price-fixing conspiracy be shown "as a matter of practical economics" to have a not insubstantial effect on the interstate commerce involved. . . . [T]he broker charges a fee generally calculated as a percentage of the sale price. Brokerage activities necessarily affect both the frequency and the terms of residential sales transactions. Ultimately, whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the [interstate] demand for financing and title insurance. . . . Where, as here, the services of respondent real estate brokers are often employed in the relevant market, petitioners at trial may be able to show that *respondents' activities* have a not insubstantial effect on interstate commerce.¹³¹

It is not clear what the Court meant by "infected" activities (in the first quoted sentence) or by "respondents' activities" (in the last quoted sentence),¹³² and, thereafter, confusion reigned in the lower courts.¹³³ To the surprise of many observers, in *Summit Health, Ltd. v. Pinhas*¹³⁴ the Court refused substantially to retrench its position on antitrust and interstate commerce. Cases continue to rely on *McLain* to establish Con-

¹³⁰ *Id.* at 242–43. The Court said this approach was supported by two considerations from the case law, namely, that a per se violation can be based on "purpose" rather than effect, and that a plaintiff can qualify for injunctive relief without proof of "legally cognizable damages." *Id.* at 243.

¹³¹ *Id.* at 246 (emphases added).

¹³² The word "infected" does not appear in the *McLain* briefs or oral argument transcript, or, to my knowledge, in previous cases. "Where 'infected' came from only Warren Burger and his clerks know." Letter from Judge Frank H. Easterbrook, *supra* note 127.

¹³³ *E.g.*, Neil P. Motenko, *Establishing Interstate Commerce*, in DEVELOPMENTS IN ANTITRUST HEALTH CARE LAW 227 (Phillip Proger, Roxane Busey & Tina Miller eds., 1990) (reviewing cases); Bruce Little, Note, *A Case of Judicial Backsliding: Artificial Restraints on the Commerce Power Reach of the Sherman Act*, 1985 U. ILL. L. REV. 163 (reviewing cases).

¹³⁴ 500 U.S. 322 (1991); see Calkins, *The 1990–91 Supreme Court Term*, *supra* note 9, at 618–37.

gress's intent in the Sherman Act was to extend jurisdiction to the outer bounds of the Commerce power,¹³⁵ perhaps thanks in part to an amicus.

C. ASSOCIATED GENERAL CONTRACTORS

Few briefing patterns are more suggestive of amici influence than that of the leading antitrust standing case, *Associated General Contractors of California, Inc. v. California State Council of Carpenters*.¹³⁶ Petitioner presented the Court with what was principally a labor-antitrust case. Three of the four questions presented addressed labor antitrust, as did five of the six points Petitioner made in its summary of argument.¹³⁷ Its last point called for the Court to reject the "zone of interests" test of standing and, applying the "target area" test, conclude that plaintiff unions were too far removed.¹³⁸

In the hands of several amici, *Associated General Contractors* was a very different case. In particular, the Solicitor General (with AAG Baxter), although arguing that defendants had restrained trade and were not immune from antitrust scrutiny, devoted substantial space to arguing that the unions lacked standing. The SG urged the Court to look to the policy reasons informing standing decisions, but to use a multi-factor test rather than the tests used by the lower courts. After plaintiff had made a minimal showing, the SG would make a "prudential" evaluation of factors, such as (1) "whether the damages are speculative and very difficult of proof;" (2) "whether there is a serious risk of duplicative recoveries;" and (3) "whether there exists another class of potential plaintiffs" whose claims were more manageable.¹³⁹ Similarly, a trade association amicus supporting defendants argued first that there was no standing under a "target area" test, and then that antitrust policy reasons counsel against letting a union sue for derivative loss from harm directly to its members.¹⁴⁰ Another such association wrote at length about the policy reasons making it important to limit antitrust standing.¹⁴¹ When Justice Stevens for the Court wrote about "the strong interest . . . in

¹³⁵ See, e.g., *United States v. Romer*, 148 F.3d 359 (4th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999); *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College*, 128 F.3d 59 (2d Cir. 1997) (college residency plan could affect commerce).

¹³⁶ 459 U.S. 519 (1983).

¹³⁷ Brief of Petitioner at 1, 6-8, (Feb. 27, 1982), *available in* LEXIS.

¹³⁸ *Id.* at 26-29.

¹³⁹ Brief for the United States as Amicus Curiae Supporting Reversal at 16 (May 7, 1982), *available in* LEXIS.

¹⁴⁰ Brief of Pacific Maritime Ass'n as Amicus Curiae at 12-15 (Feb. 25, 1982), *available in* LEXIS.

¹⁴¹ Motion of the Associated General Contractors of America, Inc. for Leave to File a Brief Amicus Curiae in Support of the Petitioner at 9-14 (Feb. 25, 1982), *available in* LEXIS.

keeping the scope of complex antitrust trials within judicially manageable limits" and about the multiple factors that must be considered as part of an antitrust standing analysis,¹⁴² he wrote words much more in harmony with these amicus efforts than with the litigants' work.

D. COPPERWELD

The Solicitor General's amicus briefs also appeared to be key to the Court's opinion in *Copperweld*. Copperweld's petition for certiorari set forth a straightforward position: There is "disarray among the circuits"; Supreme Court clarification is needed; and there is a "principled and practical alternative to the existing confusion."¹⁴³ The petition sought a narrow response to a narrow question.

The SG's amicus brief on the petition, for the Antitrust Division and the FTC, took a different approach. The heart of antitrust doctrine, the brief argued, is the application of "more stringent legal standards for multiparty conduct than for unilateral action."¹⁴⁴ In words that would be echoed by the Court, the brief contrasted Sherman Act Sections 1 and Section 2. Under the latter, "there is no violation unless analysis of market structure and conduct indicates the presence of at least a dangerous probability of monopolization."¹⁴⁵ "The difficulty with the intraenterprise conspiracy of doctrine is that it evaluates conduct within a single competitive unit by the stringent standard for conspiracy cases, simply on the basis of an enterprise's choice of corporate form."¹⁴⁶ Although, as always, causation is uncertain, it may be sufficient to say that there are obvious parallels between the Court's opinion and the SG's lead.¹⁴⁷

¹⁴² 459 U.S. at 543, 545 (factors include "the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy").

¹⁴³ Petition for Certiorari, *Copperweld*, headings I.A. & I.C. (Jan. 28, 1983), available in LEXIS, Federal Legal-U.S.: Supreme Court cases and materials: US Supreme Court Briefs). For its "practical alternative," petitioners urged the Court to hold that no agreement among parents and wholly owned subsidiaries can violate Sherman Act § 1. "This rule would recognize that, where there is a complete unity of legal and economic interests, a parent and subsidiary should be viewed as a single enterprise." Petition at text under heading II.C.

¹⁴⁴ Brief for the United States as Amicus Curiae Supporting Petitioners (May 31, 1983), available in LEXIS. The same distinction was highlighted in an article Professor Areeda published in the December 1983 *Harvard Law Review*. See Phillip Areeda, *Intraenterprise Conspiracy Doctrine in Decline*, 97 HARV. L. REV. 451, 454-56 (1983).

¹⁴⁵ Brief for the United States as Amicus Curiae Supporting Petitioners (May 31, 1983), available in LEXIS (citations omitted).

¹⁴⁶ *Id.*

¹⁴⁷ See Calkins, *Copperweld*, *supra* note 9, at 349-50.

E. JEFFERSON PARISH

Even if a brief, or a brief's approach, is not reflected in the opinion toward which it is filed, it can make a difference. Many antitrust issues are timeless, with today's resolution creating tomorrow's disagreement. An amicus brief apparently ignored by a court nonetheless can advance what is in effect an antitrust conversation among the courts, academics, enforcers, and private practitioners. Amicus briefs can also make a difference by informing a concurring or dissenting opinion. One of the more striking examples is *Jefferson Parish Hospital District No. 2 v. Hyde*.¹⁴⁸ Justice Stevens wrote a confusing (if not confused) opinion for the Court, in which Justices Brennan, White, Marshall, and Blackmun joined. Justice O'Connor wrote a clear, powerful opinion concurring in the judgment, in which Chief Justice Burger and Justices Powell and Rehnquist joined. It echoes some themes in briefs of amici.

Most notably, Justice O'Connor called for abandonment of the *per se* label for tying.¹⁴⁹ Even Frank Easterbrook, counsel of record for the defendant, had not gone that far—but the Justice Department and perhaps the Federal Trade Commission had. Very casually, in the last sentence of a long paragraph, the Solicitor General's brief states that "[s]ince the anticompetitive potential of tie-ins and exclusive dealing contracts is basically identical, both arrangements should be judged by the same criteria."¹⁵⁰ That sentence was highlighted by a vigorous rebuttal argument by another amicus.¹⁵¹ One wonders whether Justice O'Connor would have gone so far had the proposition not been suggested by anyone.

Just as important, Justice O'Connor's approach to tying analysis finds close parallels in amicus briefs. She set out three threshold criteria: (1) "the seller must have power in the tying-product market;" (2) "there must be a substantial threat that the tying seller will acquire market power in the tied-product market;" and (3) "there must be a coherent economic basis for treating the tying and tied products as distinct."¹⁵²

¹⁴⁸ 466 U.S. 2 (1984).

¹⁴⁹ *Id.* at 35 (O'Connor, J., concurring).

¹⁵⁰ Brief for the United States as Amicus Curiae in Support of Reversal, *Jefferson Parish*, at 13 (May 14, 1983) (SG Brief), available in LEXIS (citing Tyler Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot*, 66 VA. L. REV. 1235, 1306 (1980)). An odd footnote to the brief said that the FTC joined in the brief first part of the brief and "also supports the general conclusions of Section II and III, that the legal treatment of tying arrangements should be clarified to take into account the relevant economic and competitive factors." SG Brief at 5 n.9.

¹⁵¹ Brief Amicus Curiae of the American Society of Anesthesiologists, Inc. in Support of Respondent at 17-19 (July 8, 1983), available in LEXIS.

¹⁵² 466 U.S. at 37-39 (O'Connor, J., concurring).

The SG set forth a similar list of three “pre-conditions”: (1) “that the seller have significant economic power in the market for the tying product;” (2) “impact on the tied product market,” and (3) that there is “a realistic threat of anticompetitive effects” justifying a two-product conclusion.¹⁵³

Justice O'Connor's conclusion turned on the third issue. “Even when the tied product does have a use separate from the tying product, it makes little sense to label a package as two products without also considering the economic justifications for the sale of the package as a unit.”¹⁵⁴ Here, she saw substantial benefits from linking the provision of surgery and anesthesia, and, because they were demanded together, no way that linking them could give a hospital “*additional* market power.”¹⁵⁵ The “demanded together” point was vigorously asserted in an amicus brief filed by the American Hospital Association.¹⁵⁶ That brief and an amicus brief that the future AAG Joel Klein filed, as well as the SG's brief, called for examination of justifications and economic consequences as part of choosing between one product or two.¹⁵⁷

In contrast, Justice Stevens's opinion for the Court may have suffered from the absence of “big picture” advocacy by amici. No brief supporting respondent sets out either the Court's “character of the demand” test for deciding whether two products exist or any other test.¹⁵⁸ With one exception, no brief on either side argued that a 30 percent market share was insufficient to support a tying violation, as the Court ruled.¹⁵⁹ The briefs passed like ships in the night, disagreeing more on the issues than

¹⁵³ SG Brief at 8, 11, 13.

¹⁵⁴ 466 U.S. at 40 (O'Connor, J., concurring).

¹⁵⁵ *Id.* at 43.

¹⁵⁶ Brief Amicus Curiae of the American Hospital Association in Support of the Petitioners at 8 n.5 (May 16, 1983), *available in* LEXIS.

¹⁵⁷ *Id.* at 6–9 (LEXIS); Brief for the National Association of Private Psychiatric Hospitals as Amicus Curiae at 6–10 (May 13, 1983), *available in* LEXIS; SG Brief at 8–11. The SG's brief also made important subsidiary points later made by Justice O'Connor, including the limited probative value of patents in determining the existence of market power, *compare* 466 U.S. at 37 n.7, *with* SG Brief at 12, and the possible specialized uses of tying for regulatory evasion (harmful) or metering (ambivalent), *compare* 466 U.S. at 36 n.4, *with* SG Brief at 15 n.26.

¹⁵⁸ See 466 U.S. at 19.

¹⁵⁹ *Id.* at 26–27. After Respondent, in an argument about geographic market definition, noted that 70% of the hospital's patients come from the East Bank of Jefferson Parish, Petitioner's closing rejoinder was that “even now 70% of the people who live in the East Bank go to hospitals other than East Jefferson General,” so the hospital “faces ample competitive constraints.” Reply Brief of Petitioners at 8, *available in* LEXIS. Two other briefs review the 70%-go-elsewhere datum but only in connection with market definition. See Brief Amicus Curiae of the American Hospital Association in Support of the Petitioners at 14; Amicus Curiae Brief [by Louisiana State Medical Society] on Behalf of the Respondent at 7.

any attempted resolution thereof, and an important antitrust opinion is the less clear because of it.

F. FRIENDS OF THE "QUICK LOOK"

Probably the most celebrated amicus brief that did not carry the day with the Court was the joint Justice Department-Federal Trade Commission brief in *NCAA*. *NCAA* became a leading case closely associated with a middle form of antitrust scrutiny even though it failed to adopt or even discuss the careful analytical structure the agencies had set out in their brief.

In fact, amici have long played a key role in addressing the intersection between the *per se* rule and the rule of reason. Perhaps the most important contribution was the amicus brief the Solicitor General filed in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,¹⁶⁰ the seminal case in the debate about when agreements that affect price are not price fixing. In response to the Court's invitation, the Justice Department filed a powerful brief explaining why the *per se* rule should not apply to what the Second Circuit had labeled price fixing.¹⁶¹ Although one can find key points from the Court's subsequent opinion in the petitioners' briefs, the SG's brief eloquently sings the melody that the Court adopted as its own.¹⁶² Ever since *Broadcast Music*, courts have struggled to separate

¹⁶⁰ 441 U.S. 1 (1979).

¹⁶¹ Brief for the United States as Amicus Curiae at 16-22 (Nov. 27, 1978), *Broadcast Music*.

¹⁶² *Id.* at 9-11 (Summary of Argument):

[A]n agreement among competitors to market a product or service fundamentally different from anything any of them individually can market has never been found to be price fixing under circumstances where, as here, there is no agreement not to sell the individual products or services at any price the competitors choose, and where the project is not a disguise for price fixing.

As the case of mergers illustrates, not every species of agreement among competitors that somehow has an effect on price is *per se* illegal. The Court has been careful to examine each species of restraint, usually after experience with it, before determining whether it should be categorically deemed unlawful.

Several considerations preclude a determination that the agreement to market a blanket copyright license is *per se* unlawful. ASCAP's blanket license is a distinctive product, fundamentally different from any license any one of its members can sell. . . . The blanket license also saves enormous costs that would otherwise be required to transact the purchase of individual licenses for single performances, especially in the case of music users such as radio stations that frequently play music.

If such a comprehensive product, with its offer of savings, is to be available at all, it must be assembled and marketed through as society such as ASCAP, and the members of the society necessarily must agree on the price at which the product is to be sold. Such an agreement to market a new product or service is not illegal *per se* under Section 1 even though the parties set its price, because the agreement on the price is essential if the new product or service is to be sold at all.

concerted action into per se and rule of reason boxes, or, perhaps, a middle category, commonly (but unfortunately¹⁶³) referred to as the "quick look."

NCAA was not the first SG brief to discuss the "quick look." That honor goes to the amicus brief filed two months into AAG Baxter's tenure as head of the Antitrust Division, in *Maricopa County*. The innovation, seemingly without effect in that case, helped move forward an ongoing discussion. Petitioner State of Arizona portrayed the case as involving straightforward per se price fixing, not saved by involving maximum prices or by assertions that prices were reasonable.¹⁶⁴ An amicus brief filed by thirty-nine states was to the same effect.¹⁶⁵ Indeed, the SG's amicus supporting the grant of certiorari took the same approach: "For the second time in a year, the Ninth Circuit has seriously misconstrued the per se doctrine. . . . It should be reversed."¹⁶⁶ The SG suggested that the Court consider summary reversal.

The SG's brief on the merits, perhaps inspired in part by Senior District Judge Larson's unusually thoughtful dissent below,¹⁶⁷ took a very different tack, although not as different as AAG Baxter would have liked.¹⁶⁸ The

¹⁶³ See Calkins, *Full Monty*, *supra* note 9, at 544–47.

¹⁶⁴ See Brief for Petitioner (June 5, 1981), *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982).

¹⁶⁵ Brief for the States of Alabama et al., at 5 (June 5, 1981), *available in* LEXIS ("The respondents' fee agreements in the present case constitute price fixing. As such, those agreements are clearly illegal per se under the precedent established by this Court.").

¹⁶⁶ Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari at 3 (May 28, 1981), *available in* LEXIS (referencing *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980)).

¹⁶⁷ Judge Larson asked three questions: Is this the type of practice previously adjudged per se illegal; if not, should it now be declared per se illegal; and, "[t]hird, even if the rule of reason must be applied, is the practice so plainly anticompetitive that only a truncated rule of reason analysis need be carried out." *Arizona v. Maricopa County Medical Society*, 643 F.2d 553, 563 (9th Cir. 1989) (Larson, J., dissenting). The "central lesson" of *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), "appears to be that when the nature and character of an agreement among professionals is plainly anticompetitive, no extended analysis is necessary to find it forbidden under the Sherman Act." 643 F.2d at 564. Although Judge Larson found per se analysis applicable, he wrote that "even if the rule of reason is the correct standard by which to judge defendants' activities, a detailed economic analysis of the industry is not necessary." *Id.* at 569.

Judge Larson's dissenting opinion is the first judicial use of the term "truncated rule of reason." It was issued several months before the case more familiarly associated with a middle category of antitrust analysis, *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1367 (5th Cir. 1980) (relying on *LAWRENCE SULLIVAN, ANTITRUST* 192 (1977)), and several years before the term "quick look" was first judicially used in *Vogel v. American Society of Appraisers*, 744 F.2d 598, 603 (7th Cir. 1984).

¹⁶⁸ Baxter later was to complain that the brief as drafted "consisted of a mechanical application of past doctrinal statements of the Court," and he insisted that it be "rewritten" to recognize "that horizontal maximum agreements could be procompetitive." Baxter,

brief reviewed the usual sweeping condemnations of horizontal price manipulation, but it said that "[t]hese principles provide the *starting point* for analysis in this case."¹⁶⁹ It elaborated as follows:

[W]hen a court is confronted with a particular agreement that appears on its face to fall within a per se rule, but which the defendants claim has some competitive justification, a preliminary factual inquiry may be necessary to determine if the per se rule should be applied. . . . The judicial focus of this preliminary scrutiny or "quick look" should be limited to ascertaining whether the proponents of the agreement have identified significant procompetitive effects achieved through integration of productive capacity that are unattainable in the absence of the agreement. Only if such effects are found would further inquiry under the rule of reason be warranted.

The brief references Judge Larson's opinion below as well as Judge Bork's *Antitrust Paradox*.¹⁷⁰ It concludes that "[t]he agreements at issue, whether given a quick look under the per se rule or subjected to a limited inquiry under the rule of reason, violate Section 1 of the Sherman Act."¹⁷¹

The Court's opinion in *Maricopa County* shows scant evidence of benefiting from the SG's innovative brief. At oral argument, Stephen Shapiro, Assistant to the Solicitor General, endorsed application of the per se rule but devoted much of his time to a more nuanced presentation. Making the now-familiar comparison to law firm partnerships, he posited a two-part inquiry that asks whether an agreement is "an essential facet of joint productive activity."¹⁷² The Court, which peppered the other two oralists with an almost unbroken stream of questions, responded to Mr. Shapiro's argument with almost none. If nothing else, they heard an articulation of something other than a straight per se approach.

Even if the SG's *Maricopa* amicus effort is not reflected in the Court's opinion, it was not, as they say, in vain. It is obviously a precursor to the ambitious amicus brief that the Solicitor General, with the Federal Trade Commission, filed in *NCAA*.¹⁷³ Relying on, among other things, the work

supra note 24, at xvi. He did not return to the brief until it had been filed as revised—in a form that, although it "complied minimally" with his instructions, was "totally unsatisfactory to me." *Id.*

¹⁶⁹ Brief for the United States as Amicus Curiae, at 8 (emphasis added). Although Bill Baxter formally took office only on March 30, 1981, he began working at the Division in late January. See Schmalensee, *supra* note 108, at 1323.

¹⁷⁰ ROBERT H. BORK, *THE ANTITRUST PARADOX* (1978).

¹⁷¹ Brief for the United States as Amicus Curiae at 15 (LEXIS).

¹⁷² 1981 U.S. TRANS LEXIS 10, *26-*27 (Nov. 4, 1981).

¹⁷³ Earlier steps were taken by the Federal Trade Commission. See *American Med. Ass'n*, 94 F.T.C. 701, 1004 (1979) (Clanton, Comm'r) ("the contours of the analysis required under the rule or reason will vary somewhat depending upon the nature of the restraint"), *aff'd*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982);

of Professors Sullivan and Areeda,¹⁷⁴ the SG advocated a “middle ground” that he referred to variously as an “abbreviated” and a “truncated” rule of reason:

[C]ourts should first ask whether challenged conduct is likely, absent an efficiency justification,* to lead to the restriction of output, for such conduct is inherently suspect. Where output restriction does appear likely, we must ask whether there is a plausible efficiency justification for the practice, *i.e.*, is there reason to believe that the restraint may nonetheless have significant efficiency benefits and therefore enhance competition and output. In the event that there is no plausible efficiency justification, the suspect practice is *per se* illegal . . .

But, in cases where the participants raise a plausible efficiency justification for conduct that is facially suspect, *per se* characterization is inappropriate, because more scrutiny is needed to evaluate the restraint's overall competitive effect. It may be that further examination will show that the proffered efficiency justification should be rejected; in that event, the conduct can still be condemned as unreasonable without completing a “full” rule of reason analysis that includes market definition and market power determinations. On the other hand, if efficiency benefits are shown to be likely, a more elaborate rule of reason inquiry is called for, with a thorough analysis of market power, in order to determine whether the practice is, on balance, harmful or beneficial.¹⁷⁵

Here, again, the Court failed to follow closely the Government's lead. The Court quoted with approval the Government's brief to support its holding that “[t]his naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.”¹⁷⁶ But this was a far cry from adopting the carefully structured approach the Government had advanced; indeed, the Court proceeded to find that the NCAA in fact had market power.¹⁷⁷

The Solicitor General and the Antitrust Division tried again to promote the “quick look” by making it the central thrust of their amicus brief in

Michigan State Medical Soc'y, 101 F.T.C. 191, 292 (1983) (Clanton, Comm'r) (“Where horizontal arrangements so closely relate to prices or fees as they do here, a less elaborate analysis of competitive effects is required.”) (citing *Professional Engineers*).

¹⁷⁴ Brief for the United States as Amicus Curiae Supporting Affirmance at 7 n.6 (Jan. 17, 1984) (citing LAWRENCE SULLIVAN, ANTITRUST 192 (1977), *NCAA v. Board of Regents*, 468 U.S. 85 (1968); Phillip Areeda, *The “Rule of Reason” in Antitrust Analysis: General Issues* 37–38 (Federal Judicial Center June 1981)).

* An efficiency justification exists if the challenged restraint increases the quantity or quality, or reduces the cost, of overall output—e.g., by creating a new product, improving the operation of a market, or reducing production or marketing costs—and is reasonably necessary to achieve such efficiencies.

¹⁷⁵ Amicus Brief, *supra* note 174, at n.9 (footnote in original).

¹⁷⁶ 468 U.S. at 110 & n.42.

¹⁷⁷ *Id.* at 111–13.

Northwest Wholesale Stationers.¹⁷⁸ Justices expressed obvious discomfort with the idea during oral argument,¹⁷⁹ and the Court's opinion ignores the concept.¹⁸⁰

Meanwhile, the Federal Trade Commission, which had joined in the SG's NCAA amicus brief, built upon that approach and formally adopted a structured series of questions in *Massachusetts Board of Registration in Optometry*.¹⁸¹ Later that same year the Antitrust Division issued a new version of its Antitrust Enforcement Guidelines for International Operations. These formally set forth the Division's somewhat different structured set of questions, which the Division said it would apply in making a rule of reason analysis of a joint venture.¹⁸² The Commission then backed away from its *Mass. Board* approach in its opinion in *California*

¹⁷⁸ Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari at pt.2.a. (Aug. 31, 1984) (Ninth Circuit seriously erred by applying per se rule rather than "quick look" but Court should deny certiorari), available in LEXIS; Brief for the United States as Amicus Curiae Supporting Reversal at 6 (LEXIS), *Northwest Wholesale* (Nov. 15, 1984) ("[A] court faced with an alleged group boycott must take a quick look at the likelihood of anticompetitive consequences and the plausibility of any asserted efficiency-related justification before characterizing the activity as the sort of boycott to which the per se rule applies.") (footnote omitted), available in LEXIS.

¹⁷⁹ Justice O'Connor asked, "[W]hen does the so-called quick look that you espouse shade into the closer look of a rule of reason? It seems to me that there is a shading there that is a little difficult to understand or apply for courts." She further asked whether a court should "have a mini-rule of reason trial to determine whether to apply the rule of reason." Justice White asked how, if "the so-called quick look review" reveals "good faith differences of opinion," anything could be found per se illegal. He wondered whether a "quick look" review wouldn't be tantamount to a rule of reason trial. 1985 U.S. TRANS LEXIS 74, at 18-20 & 23 (Feb. 19, 1985); see *Supreme Court Considers Expulsion of Member from Purchasing Cooperative*, 48 Antitrust & Trade Reg. Rep. (BNA) 349 (identifying Justices).

¹⁸⁰ *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985).

¹⁸¹ 110 F.T.C. 549, 604 (1988) (Calvani, Comm'r):

First, we ask whether the restraint is "inherently suspect." In other words, is the practice the kind that appears likely, absent an efficiency justification, to "restrict competition and decrease output"? . . . If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed. But if it is inherently suspect, we must pose a *second* question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or enhancing competition (e.g., by reducing the costs of producing or marketing the product, creating a new product, or improving the operation of the market)? Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry—a *third inquiry*—is needed to determine whether the justification is really valid. If it is, it must be assessed under the full balancing test of the rule of reason. But if the justification is, on examination, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry—there are no likely benefits to offset the threat to competition.

¹⁸² 4 Trade Reg. Rep. (CCH) ¶ 13,109, at 20,600.

Dental Association,¹⁸³ whereupon AAG Joel Klein unveiled a Justice Department approach that departed sharply from the Division's former approach and adopted a series of questions that bore some resemblance to those in *Mass. Board*.¹⁸⁴

In what now seems to have been a mistake, the Division and the FTC relied on AAG Klein's "stepwise approach" to argue that the Second Circuit's decision in *Discon, Inc. v. NYNEX Corp.*,¹⁸⁵ that a two-firm vertical agreement not to deal could be illegal without proof of anticompetitive effect, was consistent with the agencies' view of settled law.¹⁸⁶ After the Court, unpersuaded, granted certiorari, private amici vehemently objected that the agencies' approach would "turn[] the ordinary antitrust burden of proof upside down."¹⁸⁷ In fact, after the Court decided to hear the merits, the agencies jointly recommended that the Second Circuit's judgment be vacated,¹⁸⁸ and the Court did so. Even before the Court's *NYNEX* opinion issued in December 1998, however, the Court had granted certiorari in *California Dental Association v. FTC (CDA)*¹⁸⁹ and received amicus briefs on the merits of that case that blended AAG Klein's "stepwise approach" and the Commission's *CDA* opinion and characterized them as a threat to sound antitrust policy.¹⁹⁰ The give

¹⁸³ *California Dental Ass'n*, 121 F.T.C. 190 (1996).

¹⁸⁴ Joel I. Klein, Acting Assistant Attorney General, Antitrust Division, A Stepwise Approach to Antitrust Review of Horizontal Agreements, Address Before the ABA Section of Antitrust Law (Nov. 7, 1996), available at <http://www.usdoj.gov/atr/public/speeches/jikaba.htm>, reprinted in [Current Comment] Trade Reg. Rep. (CCH) ¶ 50,157.

¹⁸⁵ 93 F.3d 1055 (2d Cir. 1996), vacated, 525 U.S. 128 (1998).

¹⁸⁶ Brief for the United States and the Federal Trade Commission as Amici Curiae on the Petition for Certiorari at 16-17 (Feb. 1998), *NYNEX Corp. v. Discon, Inc.*, (citations omitted), available at <http://www.usdoj.gov/atr/cases/fl600/1612.htm>.

[T]he approach suggested by the court of appeals here is consistent with that suggested by this Court's opinions in *Indiana Federation of Dentists*, *supra*, and *NCAA v. Board of Regents*, 468 U.S. 85 (1984). In those cases, the Court indicated that, once the defendants' conduct has been shown to be anticompetitive based on its character or its effects, the conduct will be deemed to be unreasonable without any extensive market analysis, unless the defendants advance an adequate procompetitive justification.

¹⁸⁷ Brief of Amicus Curiae GTE Corporation in Support of Petitioners at 7 (June 1, 1998), available in LEXIS; see also Brief for the Business Roundtable as Amicus Curiae in Support of Petitioners (May 29, 1998) (protesting DOJ/FTC brief), available in LEXIS.

¹⁸⁸ Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Vacating the Judgment (June 17, 1998).

¹⁸⁹ 526 U.S. 756 (1999).

¹⁹⁰ Brief for the NCAA as Amicus Curiae in Support of Reversal, 1998 WL 789350 *11-*12, *17-*18 (Nov. 10, 1998). The brief, and, later, the Court, 119 S. Ct. at 1617 n.15, cited an unusually vigorous and insightful "point"-counterpoint debate, Joel I. Klein, *Point: A "Stepwise" Approach for Analyzing Horizontal Agreements Will Provide a Much Needed Structure for Antitrust Review*, ANTITRUST, Spring 1998, at 41; William J. Kolasky, Jr.,

and take did not provide the most favorable litigating context for the Commission, although it did help elucidate the agencies' and the courts' thinking.

Now, the Supreme Court has muddied the waters further with its disappointing opinion in *CDA*. Part of the confusion and potential mischief from *CDA* stems from the Court's repeated use of the word "plausible," as in its observation that "CDA's advertising restrictions might plausibly be thought to have a net procompetitive effect."¹⁹¹ A vigorous amicus brief filed by the NCAA had focused on the word "plausible" and argued repeatedly that "full rule-of-reason analysis must supersede the 'quick look' review if the defendant presents a plausible procompetitive justification."¹⁹² If that brief helped cause the Court to refer so frequently to plausibility, it did not serve antitrust doctrine well¹⁹³ but it would serve as another example of amici shaping antitrust discussions.

That is not the end of the discussion, however; far from it. The antitrust community will apply and interpret *California Dental*.¹⁹⁴ The antitrust agencies were especially quick to do so, in their Antitrust Guidelines for Collaboration Among Competitors.¹⁹⁵ The Guidelines provide a vehicle for the agencies to rebound from the *CDA* defeat by setting forth their interpretation of that controversial case. The discussion continues.

VII. CONCLUSION

The antitrust law that we know and apply is almost certainly richer and different because of the active participation of amici. For more than a score of years, amici have regularly participated in shaping antitrust doctrine. By taking possibly surprising positions (and sometimes remaining surprisingly quiet), through important research, by credibly highlighting egregious errors, by supplying context and special emphasis, and, sometimes, by helping set forth an analytical approach, they have made a difference. Amici are essential participants in the antitrust conversation.

Counterpoint: The Department of Justice's "Stepwise" Approach Imposes Too Heavy a Burden on Parties to Horizontal Agreements, ANTITRUST, Spring 1998, at 31.

¹⁹¹ 526 U.S. at 771; see Calkins, *Full Monty*, *supra* note 9, at 533. The author was General Counsel of the FTC when the Commission decided *California Dental*.

¹⁹² Brief for the National Collegiate Athletic Association as Amicus Curiae in Support of Reversal, 1998 W L 789350 at *5.

¹⁹³ See Calkins, *Full Monty*, *supra* note 9, at 549-50.

¹⁹⁴ The Ninth Circuit recently ordered the complaint dismissed, which (if not successfully appealed) will end the specific dispute. *California Dental Ass'n v. FTC*, 224 F.3d 942 (9th Cir. 2000).

¹⁹⁵ Available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.